

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROY MARVIN RAINS
Claimant

VS.

**HIGHLAND EXPRESS SHUTTLE
SERVICE**
Respondent

AND

COMMERCE & INDUSTRY INS. CO.
Insurance Carrier

Docket No. 1,023,794

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the June 1, 2007, preliminary hearing Order Nunc Pro Tunc entered by Administrative Law Judge Bryce D. Benedict. R. Todd King, of Wichita, Kansas, appeared for claimant. John B. Rathmel, of Merriam, Kansas, appeared for respondent and its insurance carrier.

The Administrative Law Judge (ALJ) ordered medical treatment of claimant with Dr. Liem Trang for the prescription of medications only, to be paid by respondent.¹

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 2, 2007, motion hearing and exhibits; the September 21, 2005, preliminary hearing, together with the pleadings contained in the administrative file, including the Award entered August 20, 2007.

¹ The hearing was both a request for medical treatment and a motion for penalties. The ALJ did not order penalties and that issue was not raised on appeal. Accordingly, this appeal will be treated as an appeal from a preliminary hearing order only.

ISSUES

Respondent requests review of the ALJ's Order Nunc Pro Tunc, specifically arguing that the ALJ exceeded his jurisdiction by issuing, without notice or hearing, the Order Nunc Pro Tunc changing the substantive content of a previous Order that had become final; by issuing an Order Nunc Pro Tunc to correct judicial error and not scrivener error; by issuing an Order Nunc Pro Tunc to correct an Order entered without proper jurisdiction; and by issuing an Order Nunc Pro Tunc without agreement of the parties.

Claimant argues that respondent's appeal should be dismissed for lack of jurisdiction or, if the Board finds it has jurisdiction of this appeal, the ALJ's Order Nunc Pro Tunc should be affirmed.

The issues for the Board's review are:

- (1) Does the Board have jurisdiction over this appeal?
- (2) Did the ALJ exceed his jurisdiction by issuing the Order Nunc Pro Tunc?
- (3) Are the issues in this appeal moot because of the subsequent entry of the final Award in this matter?

FINDINGS OF FACT

At the request of claimant, a Motion Hearing was held on May 2, 2007. At that hearing, claimant requested the appointment of Dr. Liem Trang as his authorized treating physician for medications. After hearing arguments on the motion, the ALJ issued an Order dated May 8, 2007, ordering medical treatment to be paid by respondent on claimant's behalf with Dr. Trang for the prescription of medication only until certified as having reached maximum medical improvement (MMI). Dr. Trang was authorized to make referrals except referrals to rehabilitation hospitals or for treatment of any mental health problem.

On May 22, 2007, claimant's attorney wrote the ALJ advising that claimant had previously been found to be at MMI and requesting an nunc pro tunc order making that clarification. On June 1, 2007, the ALJ entered his Order Nunc Pro Tunc deleting the language "only until certified as having reached maximum medical improvement" from the original Order. The ALJ also deleted the paragraph concerning referrals to rehabilitation hospitals or treatment of a mental health problem. Dr. Trang was still appointed as claimant's authorized treating physician for prescription of medication only.

A final Award was entered in this case on August 20, 2007. In that Award, the ALJ ordered: "In addition, the respondent is ordered to pay, as authorized medical, the billings

of Dr. Trang which post-date the Court's preliminary hearing order of May 8, 2007, and to include the medications prescribed by Dr. Trang."²

PRINCIPLES OF LAW

K.S.A. 44-534a(a)(2) states in part:

Such preliminary hearing shall be *summary in nature* and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. Upon a *preliminary finding* that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation *to be in effect pending the conclusion of a full hearing on the claim*, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. . . . If an appeal from a preliminary order is perfected under this section, such appeal *shall not stay the payment of medical compensation* and temporary total disability compensation from the date of the preliminary award. [Emphasis added.]

In *Carpenter*,³ the Kansas Court of Appeals noted that appeals to the Board from preliminary hearing orders are limited, and K.S.A. 44-534a(a)(2) lists disputed issues which are subject to Board review.

It is important to note that K.S.A. 1998 Supp. 44-534a(a)(2) contemplates disputes in preliminary hearings only over the compensability of the injury and the analogous question of the claimant's entitlement to benefits. It seems to us that the very purpose of the preliminary hearing is to determine whether the claimant should be receiving benefits under the Act. . . .

. . . .

[The insurance carrier] is not without a remedy because preliminary awards and orders are not binding in the full hearing. [Citations omitted.] If an insurance carrier pays compensation pursuant to a preliminary award which is then reduced or totally disallowed, the insurance carrier is reimbursed by the Fund. [Citation omitted.]

² ALJ Award (Aug. 20, 2007) at 6.

³ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 674-76, 994 P.2d 641 (1999).

In *Shanks*,⁴ the Kansas Supreme Court stated:

Appellate courts do not decide moot questions or render advisory opinions. This policy recognizes that it is the function of a judicial tribunal to determine real controversies relative to the legal rights of persons or property which are actually involved in the particular case properly brought before it and to adjudicate those rights in such manner that the determination will be operative, final, and conclusive.

It is the duty of the courts to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles which cannot affect the matters in issue before the court.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁶

ANALYSIS AND CONCLUSION

Even if this Board Member were to reverse the ALJ's Order Nunc Pro Tunc and even if such a reversal would have had an effect on the respondent's obligation to pay for medical treatment services provided by Dr. Trang, the findings and orders in the ALJ's Award would still require respondent to provide and pay for that treatment. Due to the entry of a final Award, the controversy concerning the Order Nunc Pro Tunc has ceased to exist. The appeal is moot.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that respondent's appeal of the Order Nunc Pro Tunc of Administrative Law Judge Bryce D. Benedict dated June 1, 2007, is dismissed as moot.

IT IS SO ORDERED.

⁴ *Shanks v. Nelson*, 258 Kan. 688, Syl. ¶¶ 1 and 2, 907 P.2d 882 (1995); see *Moorhouse v. City of Wichita*, 259 Kan. 570, 913 P.2d 172 (1996); *Allenbrand v. Contractor*, 253 Kan. 315, 855 P.2d 926 (1993).

⁵ K.S.A. 44-534a.

⁶ K.S.A. 2006 Supp. 44-555c(k).

Dated this _____ day of August, 2007.

BOARD MEMBER

c: R. Todd King, Attorney for Claimant
John B. Rathmel, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge